

## SKY'S RESPONSE TO THE CMA'S ISSUES STATEMENT

### SECTION 1: INTRODUCTION

- 1.1 This is Sky's response to the CMA's Issues Statement of 10 October 2017, made in conjunction with Sky's Initial Submission of 4 October 2017.<sup>1</sup>
- 1.2 Overall, the CMA has set out an appropriate framework for its assessment of the two statutory questions before it, which Sky welcomes, in the interests of a focussed, objective and expeditious merger control process. In particular, as regards the first public interest consideration:
- (a) it is correct that the CMA should first seek to explore what is the right benchmark level of media plurality against which to measure the impact of the Transaction. This is an appropriate focus, entirely consistent with the statutory question of whether the Transaction could be expected to result in *insufficient* plurality, not just in a reduction in plurality, to a degree contrary to the public interest.
  - (b) Similarly, in asking whether the ability of the MFT to control or influence Sky News will change as a result of the Transaction, it is right and consistent with the case law, not to start "*by assuming that the MFT, Fox and News Corp are to be treated as a single entity*" and instead to "*take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another*".<sup>2</sup> This instils a necessary discipline into the question of how, taking into account actual levels of control, and the Transaction itself, the MFT could be said to exert excessive influence, i.e. it requires as a minimum condition the identification of a specific mechanism, related to the Transaction, and objective evidence as to how it could be used.
  - (c) Moreover, a focus for the inquiry on news and current affairs, around which there is "*broad consensus*", is entirely appropriate.<sup>3</sup> Given this focus, the relevance of Sky's "*overall programming strategy*", and the general "*positioning of channels in Sky's electronic programming guide*",<sup>4</sup> to an assessment of whether the Transaction could be expected to result in insufficient plurality, is not readily apparent.
- 1.3 As regards the second public interest consideration, the CMA's focus on "*the current approach of Fox, Sky, the MFT and News Corp to compliance with broadcasting standards*", first and foremost, is the right one, in the context of assessing the merged entity's commitment to the attainment of the broadcasting standards objectives. Moreover, (subject to the submissions made in Section 3 below) the CMA is right to enquire as to "*the extent to which the record of compliance in one field of regulation can read across into another*", rather than simply assuming such a read across.
- 1.4 In the interests of an objective and expeditious merger control process, Sky does not consider there to be any additional relevant issues which the CMA should consider in relation to either public interest consideration.<sup>5</sup> Sky would encourage the CMA to retain its focus, in the current evidence gathering stage, in its analysis going forwards and indeed

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<sup>1</sup> Sky uses the same definitions in this response as in its Initial Submission.

<sup>2</sup> See paragraph 20 of the Issues Statement.

<sup>3</sup> See paragraph 24 of the Issues Statement. See also footnote 25.

<sup>4</sup> As referred to in paragraph 32 of the Issues Statement.

<sup>5</sup> See further paragraph 5 of the Issues Statement.

throughout, on an objective and proportionate approach to the evidence relevant to the two statutory questions the CMA must ultimately decide.

- 1.5 To assist the CMA, Sky has not sought to repeat here every point raised in its Initial Submission and at this early stage, limits itself to matters of appropriate scope and direction for the inquiry. In this vein, Sky has 3 main comments on the Statement of Issues.
- (a) As regards the first public interest consideration, in Sky's view, the CMA errs in its transposition of the statutory test into Theory of Harm 2. First, by omitting to link back the question of influence over public opinion and the political agenda to whether UK audiences are sufficiently served. Second, by articulating an unduly subjective test which does not identify a mechanism that could translate into increased influence over public opinion and the political agenda (or in turn the kind of evidence that may be relevant to why or how such a mechanism is likely to be used). Theory of Harm 2 in its current formulation is therefore unduly abstract and subjective and risks introducing considerable uncertainty into the merger review process.
  - (b) As regards the second public interest consideration, whilst Sky understands the CMA's desire at an early stage of the inquiry not to rule out potentially relevant evidence, ultimately there must be a nexus between evidence of "*compliance with other applicable regulations, and effective corporate governance more generally*" and the licensee's commitment to the attainment of the broadcasting standards objectives, for it to have a bearing on the relevant statutory question, or for the CMA to draw relevant inferences or conclusions from it.
  - (c) The CMA should not in its assessment simply assume the "*continued provision of Sky News*" and its current contribution to plurality, "*absent the Transaction*". Sky would likely be prompted to review the position in the event that the continued provision of Sky News in its current form unduly impeded merger and/or other corporate opportunities available in relation to Sky's broader business, such as the Transaction - in particular having regard to any views expressed by shareholders regarding the denial of such opportunities.

## SECTION 2: THEORY OF HARM 2 IS UNDULY ABSTRACT AND SUBJECTIVE

- 2.1 In introducing Theory of Harm 2 and the proposed assessment of whether the MFT will have greater influence over public opinion and on the political agenda, the CMA states that this "*relates to the second strand identified by Ofcom of preventing any one media owner, or voice, having too much influence over public opinion*".<sup>6</sup>
- 2.2 The question of influence over public opinion and the political agenda must ultimately be linked back to whether UK audiences are (or would be) sufficiently served.<sup>7</sup> As currently transposed into Theory of Harm 2, the test is reduced to a level of abstraction that has insufficient grounding in the statute.
- 2.3 The CMA then explains that under Theory of Harm 2, it intends to consider not just whether influence over public opinion can be exercised in practice, but also whether "*a perceived ability to exercise such influence could be sufficient to give some leverage over the*

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<sup>6</sup> See paragraph 45 of the Issues Statement.

<sup>7</sup> The specified public interest consideration in s.58 (2C) (a) of the Enterprise Act 2002 is "*the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience*" (emphasis added).

*political agenda*” (emphasis added). Further, even if “*editorial outlooks are not aligned*” (the mechanism the CMA proposes to explore in Theory of Harm 1) the CMA considers that “*the ability of the MFT to potentially exercise its influence in relation to selected issues may still affect media plurality*”.<sup>8</sup> Again, there is no clear link between this proposition and the statutory question of whether U.K. audiences are (or would be) sufficiently served.

2.4 Moreover, adopting such an approach would introduce considerable subjectivity, and in turn uncertainty, into the merger review process.

(a) In practical terms, it is difficult to see how “perceived ability” could be measured objectively (indeed it is unclear whose perceptions would be relevant here) or what conclusions or inferences could usefully be drawn from it.

(b) Moreover, the mere capacity to “*affect media plurality*” is insufficient in the context of the statutory question of whether it could be expected that the Transaction results in *insufficient* plurality.

(c) In Theory of Harm 1, the CMA identifies a mechanism, namely the coordination of Sky News’ output with that of Fox and News Corp, it wishes to explore.<sup>9</sup> Theory of Harm 2 on the other hand is entirely nebulous. It fails to identify any mechanism that could translate into increased influence over public opinion and the political agenda (and in turn it fails to identify what evidence may be relevant to why or how such a mechanism is in fact likely to be used).

2.5 Theory of Harm 2, as constructed, is therefore abstract and highly subjective. The risk with such an approach is that it opens the door to an extremely wide range of subjective views and opinion, with little bearing on the statutory question. As well as introducing uncertainty, such an approach is likely to compromise the expeditious conduct of this merger inquiry.

2.6 The combination of omitting to link back the question of influence to whether UK audiences are (or would be) sufficiently served and the subjectivity of Theory of Harm 2, moreover, risks substantially lowering the requisite standard of proof. Sky would invite the CMA, therefore, to clarify its approach to Theory of Harm 2, in light of the statutory question, to discount early on a subjective and nebulous assessment of perceptions of influence and to identify a specific mechanism that could translate into increased influence over public opinion and the political agenda (and in turn the kinds of evidence that may be relevant to why or how such a mechanism is in fact likely to be used).

### **SECTION 3: SIGNIFICANT WEIGHT SHOULD BE ATTACHED TO PROCEDURES AND TRACK RECORDS OF COMPLIANCE WITH UK BROADCASTING STANDARDS AND LESS, IF ANY, WEIGHT TO OTHER EVIDENCE**

3.1 The CMA says that it interprets the DTI Guidance to mean that its analysis “*should not simply be confined to the compliance record of the Parties as regards Broadcasting Standards in the UK*”. The CMA nevertheless recognises that it will need to “*assess the extent to which the record of compliance in one field of regulation can read across into another*” and that this will include consideration of the weight to be placed, and degree to which, compliance with

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<sup>8</sup> See paragraph 46 of the Issues Statement.

<sup>9</sup> As Sky noted in paragraphs 3.29 to 3.33 of its Initial Submission, it is essential, for there to be a public interest concern, to identify a credible mechanism, resulting from the Transaction itself, by which the MFT could be said to exert effective editorial influence over both News Corp and Sky News, as well as compelling evidence as to why the mechanism is in fact likely to be used in this way.

different regulations and corporate governance more generally can be considered relevant to assessing commitment to the attainment of the broadcasting standards objectives.<sup>10</sup>

- 3.2 The CMA of course has wide discretion to determine which issues to investigate and what weight to place on particular types of evidence and it is understandable that it would not wish to disregard at the outset, evidence that may appear to have some bearing on its assessment. However, as the CMA moves forward with its inquiry and starts to refine its analysis, Sky questions the relevance and weight that should properly be attached to evidence of the parties' *"broader attitude towards regulatory compliance and to infringements"*<sup>11</sup> and in particular to *"compliance records with broadcasting standards in different political and cultural contexts"*, *"different regulations"* altogether and *"effective corporate governance more generally"*.<sup>12</sup>
- 3.3 For such evidence to be of relevance to the statutory question there must be some link with the relevant broadcasting standards objectives. As Ofcom, the expert regulator and arbiter of broadcasting standards, put it, *"something in the nature of the corporate governance concern has to give rise to an identifiable risk in terms of broadcast standards compliance"*.<sup>13</sup> In respect of Sky, which already has established procedures and a *"particularly good"* track record of compliance with UK broadcasting standards,<sup>14</sup> it is difficult to see what or why other evidence is relevant. As regards 21CF, there would have to be something in the nature of its corporate governance that gave rise to an identifiable risk of it degrading Sky's existing procedures such as to create an *"identifiable risk in terms of broadcast standards compliance"* and to such an extent as to give rise to public interest concerns.
- 3.4 As previously submitted,<sup>15</sup> the evidence of most direct relevance (a view also shared by Ofcom<sup>16</sup>) is the broadcast compliance measures the licensee has in place and secondly the licensee's broadcasting standards compliance track record in the UK, where the relevant standards against which the commitment is to be judged apply. In this regard, the CMA is entitled to place significant weight on Ofcom's findings that 21CF's and Sky's records of compliance are *"good"*<sup>17</sup> and *"in line with other broadcasters"*.<sup>18</sup>
- 3.5 On the other hand, evidence of compliance with different broadcasting standards in different contexts, with different regulations, and with corporate governance standards more generally, do not have the requisite nexus with or *"give rise to an identifiable risk in terms of broadcast standards compliance"*.<sup>19</sup> The CMA would be justified, at an early stage, in disregarding such evidence, or at the very least, attaching very little weight to it.

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<sup>10</sup> See paragraphs 53 and 55 of the Issues Statement.

<sup>11</sup> See paragraph 54 of the Issues Statement.

<sup>12</sup> See paragraph 55 of the Issues Statement.

<sup>13</sup> See page 2 of the letter from Ofcom to the Secretary of State, dated 4 September 2017.

<sup>14</sup> See paragraph 10.28 of the Ofcom 2017 PIT Report.

<sup>15</sup> See Sky's Initial Submission.

<sup>16</sup> Pages 4-5, letter from Ofcom to the Secretary of State, dated 25 August 2017.

<sup>17</sup> See paragraph 10.28, Ofcom 2017 PIT Report and page 4 of the letter from Ofcom to the Secretary of State, of 25 August 2017.

<sup>18</sup> See Ofcom's fit and proper decision.

<sup>19</sup> See further paragraph 4.9 of Sky's Initial Submission.

## SECTION 4: THE CONTINUED PROVISION OF SKY NEWS SHOULD NOT SIMPLY BE ASSUMED

- 4.1 The CMA explains that it intends to conduct its assessment of any change in the levels of plurality resulting from the Transaction relative to current levels and in doing so, that it will assume the “*continued provision of Sky News*” in the counterfactual.<sup>20</sup>
- 4.2 The statutory question of “*the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience*”, is a different consideration to the economic analysis of competition issues in which a counterfactual is used as an analytical tool.<sup>21</sup>
- 4.3 The CMA should not simply assume the “*continued provision of Sky News*” and its current contribution to plurality, “*absent the Transaction*”. Sky would likely be prompted to review the position in the event that the continued provision of Sky News in its current form unduly impeded merger and/or other corporate opportunities available in relation to Sky's broader business, such as the Transaction - in particular having regard to any views expressed by shareholders regarding the denial of such opportunities.

## SECTION 5: CONCLUSION

- 5.1 For the reasons set out above, in respect of Theory of Harm 2, Sky would urge the CMA in its assessment of influence over public opinion and the political agenda to: a) clarify and align its approach with the statutory test of whether UK audiences are sufficiently served; and b) take a more objective, legally certain, approach to identifying a specific mechanism and evidence pertaining to that mechanism, capable of conferring on the MFT the ability to exert excessive influence post-Transaction.
- 5.2 In relation to its assessment of the merged entity's commitment to the attainment of the broadcasting standards objectives, Sky would urge the CMA to place significant weight on directly relevant evidence of the parties' broadcasting standards compliance processes and track records, and on Ofcom's findings in relation to the same, and to quickly reach a view on the weight to be placed on, or whether to disregard outright, the evidence of compliance with different broadcasting standards in different contexts, with different regulations and with corporate governance more generally.
- 5.3 Finally, Sky submits that the CMA should not in its assessment simply assume the “*continued provision of Sky News*” and its current contribution to plurality, “*absent the Transaction*”.

Sky

October 2017

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<sup>20</sup> See paragraph 64 of the Issues Statement.

<sup>21</sup> Paragraph 7.6 of the DTI Guidance states: “*The Secretary of State recognizes that, in applying the broadcasting and cross-media public interest considerations, it will be necessary to analyse and consider all the relevant circumstances at the time, on a case-by-case basis. Analysis of these considerations is different from the economic analysis of competition issues, notwithstanding the overlap mentioned above*”. In *British Sky Broadcasting Group plc v The Competition Commission* [2010] EWCA Civ 2, judgment of 21 January 2010, paragraph 54, the Court of Appeal noted that “*it must be kept in mind that the counterfactual is not a statutory test: it is an analytical tool used to assist in answering the question posed by section 47 of the Act, namely whether the creation of an RMS may be expected to result in an SLC*”. That is all the more so, in light of the different considerations raised by the public interest considerations, as compared to competition cases.